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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 DANIEL POOL,

Civil No. 04-6400-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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26 AIKEN, Judge:

27 Claimant, Daniel Pool, brings this action pursuant to the
28 Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain

1 judicial review of a final decision of the Commissioner. The
2 Commissioner denied plaintiff's application for Supplemental
3 Security Income (SSI) disability benefits under Title XVI. 42
4 U.S.C. §§ 1381-1383f. For the reasons set forth below, the
5 Commissioner's decision is remanded to the Administrative Law
6 Judge for additional findings as specified below.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed his application for SSI
9 benefits on September 17, 2000. Tr. 13-14, 114-116. Plaintiff
10 alleged disability beginning September 17, 2000, due to coronary
11 artery disease and shortness of breath. Tr. 14, 124. His
12 applications were denied initially, and upon reconsideration.
13 Tr. 94-98, 101-03. On March 16, 2004, plaintiff appeared before
14 an Administrative Law Judge (ALJ). Tr. 38-91. On April 26, 2004,
15 the ALJ issued a decision denying plaintiff's application. Tr.
16 13-22. The Appeals Council denied plaintiff's request for review,
17 tr. 5-6, making the ALJ's decision the final agency decision.
18 See 20 C.F.R. §§ 416.1481, 422.210.

19 **STATEMENT OF THE FACTS**

20 Plaintiff was 47 years old on the date of the ALJ's
21 decision. Tr. 42, 114. He has an eighth grade education and
22 past work experience as a contract laborer for various oil
23 companies, and as a molding machine operator in a pipe factory.
24 Tr. 43-47.

25 **STANDARD OF REVIEW**

26 This court must affirm the Secretary's decision if it is
27 based on proper legal standards and the findings are supported by
28 substantial evidence in the record. Hammock v. Bowen, 879 F.2d

1 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
2 mere scintilla. It means such relevant evidence as a reasonable
3 mind might accept as adequate to support a conclusion."
4 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
5 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
6 The court must weigh "both the evidence that supports and
7 detracts from the Secretary's conclusions." Martinez v. Heckler,
8 807 F.2d 771, 772 (9th Cir. 1986).

9 The initial burden of proof rests upon the claimant to
10 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
11 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
12 an "inability to engage in any substantial gainful activity by
13 reason of any medically determinable physical or mental
14 impairment which can be expected . . . to last for a continuous
15 period of not less than 12 months. . . ." 42 U.S.C.
16 § 423(d)(1)(A).

17 The Secretary has established a five-step sequential
18 process for determining whether a person is disabled. Bowen v.
19 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
20 416.920. First the Secretary determines whether a claimant is
21 engaged in "substantial gainful activity." If so, the claimant
22 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
23 §§ 404.1520(b), 416.920(b).

24 In step two the Secretary determines whether the claimant
25 has a "medically severe impairment or combination of
26 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
27 §§ 404.1520(c), 416.920(c). If not, the claimant is not
28 disabled.

1 In step three the Secretary determines whether the
2 impairment meets or equals "one of a number of listed impairments
3 that the Secretary acknowledges are so severe as to preclude
4 substantial gainful activity." Id.; see 20 C.F.R.
5 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
6 presumed disabled; if not, the Secretary proceeds to step four.
7 Yuckert, 482 U.S. at 141.

8 In step four the Secretary determines whether the claimant
9 can still perform "past relevant work." 20 C.F.R.
10 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
11 disabled. If she cannot perform past relevant work, the burden
12 shifts to the Secretary. In step five, the Secretary must
13 establish that the claimant can perform other work. Yuckert, 482
14 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
15 (f). If the Secretary meets this burden and proves that the
16 claimant is able to perform other work which exists in the
17 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
18 416.966.

19 DISCUSSION

20 The ALJ found at Step One that plaintiff had not engaged in
21 substantial gainful activity since his alleged disability onset
22 date. Tr. 15, 21. See 20 C.F.R. § 416.920(a)(4)(I). This
23 finding is not in dispute. At Step Two, the ALJ found that
24 plaintiff had the following severe impairments: coronary artery
25 disease, asthma/chronic obstructive pulmonary disease, diabetes
26 mellitus, and obesity. Tr. 21. See 20 C.F.R. §
27 416.920(a)(4)(ii). This finding is not in dispute. At Step
28 Three, the ALJ found that plaintiff's impairments did not meet or

1 equal the requirements of a listed impairment. Tr. 21. See 20
2 C.F.R. §§ 416.920(a)(4)(iii), 416.920(d). This finding is not in
3 dispute.

4 The ALJ next determined that the plaintiff had a residual
5 functional capacity to perform a significant range of light work
6 that did not involve more than occasional rope or scaffold
7 climbing, and that did not involve fumes or other respiratory
8 irritants. Tr. 19, 21. This finding is in dispute.

9 At Step Four, the ALJ found that plaintiff was not able to
10 perform his past relevant work within the residual functional
11 limitations noted above. Tr. 21. See 20 C.F.R. §§
12 416.920(a)(4)(iv), 416.920(f). This finding is not in dispute.

13 Finally, at Step Five, the ALJ found that plaintiff could
14 perform work existing in significant numbers in the national
15 economy as a parts salvager, and light assembly worker. Tr. 21.
16 See 20 C.F.R. §§ 416.920(a)(4)(v), 416.920(g). This finding is
17 in dispute.

18 The plaintiff argues that the ALJ erred when he improperly
19 rejected the opinion of plaintiff's treating physician. A
20 treating physician's opinion is entitled to controlling weight if
21 it is well supported by the medical evidence and not inconsistent
22 with the other substantial evidence in the record. 20 C.F.R. §§
23 404.1527(d)(92), 416.927(d)(2). An ALJ must present "clear and
24 convincing" reasons for rejecting the uncontroverted opinion of
25 a claimant's treating physician. Lester v. Chater, 81 F.3d 821,
26 830 (9th Cir. 1995). When the treating physician's opinion is
27 controverted, the ALJ must give "specific and legitimate" reasons
28 for rejecting the opinion. Id.

1 The ALJ rejected the opinion of plaintiff's treating
2 physician, Dr. Herscher, which held in a "check-the-box" form,
3 that plaintiff could not perform sedentary or light work for
4 eight hours a day. Tr. 18. The ALJ found that Dr. Herscher's
5 opinion "does not agree with his ongoing treatment notes and he
6 has never expressed such an opinion or even implied that the
7 claimant was severely limited by his condition. As well, there
8 is no evidence that Dr. Herscher conducted a physical capacities
9 evaluation of the claimant." Id.

10 The ALJ also found that Dr. Herscher's opinion was
11 contradicted by the opinions of Drs. Kremser and Sproed.
12 However, the last report in the record from Dr. Kremser, another
13 of plaintiff's treating physicians, was dated July 2001, one
14 month after plaintiff's angioplasty, whereby Dr. Kremser reported
15 that plaintiff had chest pain when he would stand with his arms
16 overhead while working on a car from a "pit," but that he is able
17 to climb a steep incline out from a river during a fishing trip
18 without chest symptoms. Tr. 242-43. The record does not contain
19 any opinion or treatment notes from Dr. Kremser in the more than
20 2 ½ year period that elapsed between Kremser's July 2001 opinion
21 and Dr. Herscher's March 2004 opinion finding plaintiff unable to
22 perform sedentary or light work for eight hours a day. Tr. 349-
23 51.

24 Similarly, Dr. Sproed, an examining physician, evaluated
25 plaintiff in January 2002 (again more than two years prior to Dr.
26 Herscher's March 2004 opinion) and concluded that plaintiff could
27 perform "mild" activities, continued to have evidence of
28 arteriosclerotic disease and intermittent angina, and was limited

1 as to his physical activity. Tr. 274-75.

2 The ALJ also rejected Dr. Herscher's opinion because there
3 was no evidence that he had conducted a physical capacities
4 evaluation. Plaintiff asserts that rather than reject Dr.
5 Herscher's opinion, the ALJ should have recontacted Dr. Herscher
6 to inquire as to the basis of his opinion, given the extensive
7 treatment relationship Dr. Herscher had with the plaintiff.
8 Further, plaintiff notes that the ALJ should have requested that
9 Dr. Herscher complete a physical capacities evaluation. There is
10 no evidence in the record that Dr. Herscher ever conducted a
11 physical capacity evaluation which would support his disability
12 opinion. Further, I find no evidence in the record indicating a
13 medical determination, evaluation, opinion, or comment as to
14 plaintiff's existing physical capacity despite his diagnoses.
15 Social Security regulations specify the need for a medical source
16 statement to indicate what a claimant can do despite his or her
17 impairments. See 20 C.F.R. § 416.913(b)(6). If Dr. Herscher
18 refused or was unable to prepare a statement, the ALJ could have
19 requested that information from a consultative examiner. 20
20 C.F.R. § 416.919.

21 Given the paucity of information contained in the record
22 concerning plaintiff's physical capacity given his serious
23 medical diagnoses (including coronary artery disease for which he
24 has been surgically treated, chronic obstructive pulmonary
25 disease, and diabetes), I find reason to remand this file to the
26 ALJ to obtain additional information from plaintiff's treating
27 physicians regarding plaintiff's physical limitations, if any.
28 Physician's opinions are not automatically credited as a matter

1 of law if the ALJ's finding was insufficient. Connett v.
2 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (remanding for further
3 administrative proceedings due to improperly rejected testimony
4 and medical evidence). As here, further proceedings are
5 necessary when there are outstanding issues to resolve. Id.

6 **CONCLUSION**

7 The Commissioner's decision is remanded to the
8 Administrative Law Judge for additional findings as specified
9 above.

10 IT IS SO ORDERED.

11 Dated this 25 day of April 2006.

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15 /s/ Ann Aiken

16 Ann Aiken
17 United States District Judge
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